

**Objection to the Issuance of Source Specific Operating Agreement No. 181-29071-05341,
Illinois Mining Corporation
Monon, White County, Indiana
2010 OEA 86, (10-A-J-4366)**

OFFICIAL SHORT CITATION NAME: When referring to 2010 OEA 86, cite this case as
Illinois Mining Corporation, 2010 OEA 86.

TOPICS:

hearing
fugitive dust
violations
asthma
portable stone crushing operation

PRESIDING JUDGE:

Catherin Gibbs

PARTY REPRESENTATIVES:

IDEM: Justin Barrett, Esq.
Petitioners: Walter and Janene Crawford, pro se
Respondent: Guinn Doyle, Esq.; Barnes & Thornburg

ORDER ISSUED:

August 6, 2010

INDEX CATEGORY:

Air

FURTHER CASE ACTIVITY:

[none]

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4. On April 16, 2010, Walter and Janene Crawford filed a petition for review of the Permit.
5. Janene Crawford appeared at the prehearing conference on June 29, 2010. At that time, she consented to having this matter heard on July 30, 2010.
6. The final hearing in this matter was held on July 30, 2010. Janene Crawford appeared and presented evidence; the IDEM appeared and presented evidence; the Permittee appeared by counsel.
7. The Crawfords live at 8186 N. Lowes Road in Monon Indiana. Their home is located less than ½ mile from the Facility. The Crawfords have a daughter, Kinzy, who has moderate persistent asthma and allergic rhinitis, with positive skin tests to multiple aeroallergens. Ms. Crawford has asthma.
8. Ms. Crawford is concerned about the impact of fugitive dust from the Facility on her and her daughter's health.
9. She was unable to identify any legal deficiency in the Permit.
10. Ms. Crawford seeks a requirement that the Permittee plant a tree barrier between her property and the Facility.

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management ("IDEM") and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*
2. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the ELJ, IC § 4-21.5-3-27(d). Deference to the agency's initial determination is not allowed. *Id.* "De novo review" means that, "all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings. *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247, 253 (Ind. Ct. App. 1981).
4. 326 IAC 2-9-8 sets out the regulations applicable to crushed stone processing plants. These regulations are incorporated into the Permit at Section D.3.

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5. Specifically, 326 IAC 2-9-8(b)(4)(G) states: “Fugitive particulate emissions at a crushed stone plant shall not escape beyond the property line or boundaries of the property, right-of-way, or easement on which the source is located, pursuant to 326 IAC 6-4.”
6. Ms. Crawford was unable to identify any deficiency in the Permit. She was concerned that fugitive dust crossing the property boundary would have an impact on her and her daughter’s health.
7. The OEA has held on previous occasions that a permit will not be overturned on speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: 327 Article 3 Construction Permit Application Plans and Specifications for Sidney Wastewater Treatment Plant and Sanitary Sewer System Permit Approval No. 16684*, 2004 In. Env. Lexis 22 (Ind. Off. Env. Adjud. November 5, 2004); *In Re: Objection to the Issuance of Confined Feeding Operation Approval, Swine Pro 1, LLC*, 2007 OEA 115 (“SwinePro”); *In Re: Objection to Issuance of Approval No. AW5499/Farm ID #6370, NPDES CAFO ID No. ING806370, Concentrated Animal Feeding Operation, Talara Lykins*, 2007 OEA 114, *aff’d.*, Cause No. 49F12-0708-MI-32019 (April 4, 2008) (“Lykins”); *In Re: Objection to Amendment to Approval No. AW #5076/Farm ID#6165, Confined Feeding Operation, DeGroot Dairy*, 2006 OEA 1 (“DeGroot”); *In Re: Objection to Issuance of Approval No. AW5404, Mr. Stephen Gettlefinger, Washington, IN*, 1998 WL 918589 (Ind. Off. Env. Adjud.) (“Gettlefinger”).
8. Unless a petitioner can prove that the Permittee cannot operate in accordance with the law because of flaws in the facility plans, allegations that a Permittee might violate the terms of the permit are not sufficient grounds to overturn a permit.
9. Ms. Crawford has legitimate concerns. However, it is a violation of the Permit for any fugitive dust to cross the property boundary. She has not presented sufficient evidence to show that the Permittee is incapable of complying with the terms of the Permit.
10. Further, neither IDEM nor the Office of Environmental Adjudication (“OEA”) may require an applicant to include information or to perform actions in excess of that required by law. *See In the Matter of: Objection to the Issuance of Approval No. AW-5499 Concentrated Animal Feeding Operation, Talara Lykins, Jackson County, Indiana*, Cause No. 05-W-J-3602, 2007 OEA 114, *aff’d.*, Marion County Superior Court Civil Division, Room F-12, Cause No. 49F12-0708-MI-32019 (April 4, 2008). Ms. Crawford requested that the Permittee plant a tree barrier between her property and the Facility. She did not provide any authority which would allow the OEA to grant this request and the presiding ELJ knows of no such authority.
11. Ms. Crawford has not presented sufficient evidence that the Permit is legally deficient. Therefore, judgment shall be granted in favor of the Permittee, Illinois Mining Corporation.

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FINAL ORDER

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of the Permittee, Illinois Mining Corporation and the Petition for Review filed by Petitioners is hereby **DISMISSED**.

You are hereby further notified that pursuant to provisions of I.C. § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 6th day of August, 2010 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge